INDIAN JOURNAL OF LEGAL REVIEW

VOLUME 4 AND ISSUE 4 OF 2024

INSTITUTE OF LEGAL EDUCATION

INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN - 2583-2344

(Free and Open Access Journal)

Journal's Home Page – https://ijlr.iledu.in/

Journal's Editorial Page - https://ijlr.iledu.in/editorial-board/

Volume 4 and Issue 4 of 2024 (Access Full Issue on - https://ijlr.iledu.in/volume-4-and-issue-4-of-2024/)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

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INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 4 AND ISSUE 4 OF 2024

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

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PREDATORY PRICING: STRATEGIC THEORY AND LEGAL POLICY - AN ANALYSIS

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BEST CITATION – S. RAMYASHRI, PREDATORY PRICING: STRATEGIC THEORY AND LEGAL POLICY - AN ANALYSIS, INDIAN JOURNAL OF LEGAL REVIEW (IJLR), 4 (4) OF 2024, PG. 784-802, APIS – 3920 – 0001 & ISSN – 2583-2344.

ABSTRACT

Predatory pricing is a deliberate strategy where a firm sets prices below cost to eliminate competitors, gain market dominance, and later increase prices to recoup losses. This practice, though seemingly consumer-friendly in the short term, can have severe long-term effects on competition and market health. This paper's primary components include the firm's pricing strategy, cost structure, market power, and the timeline for recouping losses. Analysing these factors helps determine whether pricing behaviour is truly predatory. Predatory pricing manifests in various forms, including selective pricing (targeting specific markets or competitors) and aggressive discounting. Each type has distinct implications for market competition and requires different regulatory responses. The effects range from the elimination of competitors, reduced market competition, and higher prices in the long term, to potential market monopolization. These outcomes can harm consumers and the overall economic environment. Furthermore it explores the Several theories explain predatory pricing. Each theory provides a different lens through which to assess the likelihood and impact of predatory pricing. It examines Dumping, where goods are sold in a foreign market below cost, can be considered a form of predatory pricing. It involves similar tactics of price suppression to weaken foreign competition, raising concerns at the intersection of trade and competition law. It also explores both Indian and UK development of legal frameworks to address predatory pricing, with India's Competition Act, 2002, and the UK's Competition Act, 1998, providing the regulatory backbone. These frameworks aim to balance market freedom with the need to prevent anti-competitive practices. In the digital market, predatory pricing has unique implications due to network effects, low marginal costs, and the dominance of platform-based companies. This environment requires modernized legal approaches to ensure competitive fairness. The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, and its successor, the Competition Act, 2002, in India, have been instrumental in shaping the regulatory approach to predatory pricing. While the MRTP Act had limitations, the Competition Act provides a more robust framework to address modern market challenges.

KEYWORDS: Predatory Pricing, Dumping, Competition, Monopoly.

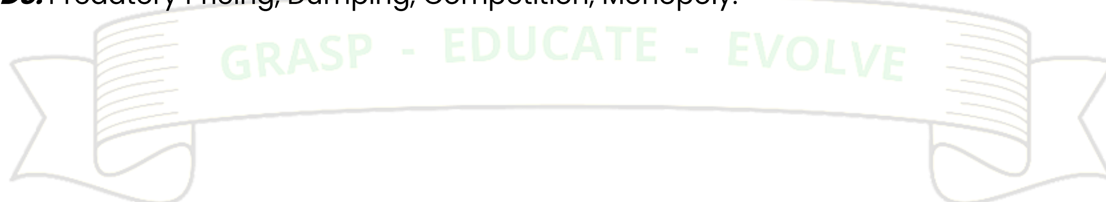

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TABLE OF CASES

S.NO	NAME OF THE CASE
1.	*MCX Stock Exchange & Others vs. National Stock Exchange, 2011*
2.	*Vaibhav Mishra vs. Sppin India Private Ltd. (known as 'Shopee Case'), 2022*
3.	*Fast Track Call Cab Pvt. Ltd. vs. Ani Technologies Pvt. Ltd., 2015*
4.	*C. Shanmugham and Manish Gandhi vs. Reliance Jio Infocomm Ltd., 2017*
5.	*Transparent Energy Systems (P) Ltd. vs. TECPRO Systems Ltd., 2013*

1. INTRODUCTION:

Predatory pricing is a controversial and complex practice where a firm sets its prices below cost with the intent to eliminate competitors, gain market share, and eventually raise prices to recoup losses and achieve higher profits. This strategy, while initially appearing beneficial to consumers due to lower prices, can have detrimental effects on market competition and consumer welfare in the long run. The concept of predatory pricing has been a subject of significant debate among economists, legal scholars, and policymakers. Its identification and regulation pose substantial challenges, as distinguishing between competitive pricing and predatory tactics is not always straightforward. Predatory pricing can take various forms, each with distinct implications for market dynamics. It has been analysed through different theoretical lenses, including the Chicago School, which often questions the rationality of such practices, and Game Theory, which views predatory pricing as a strategic move in a competitive game between firms. Moreover, predatory pricing is closely related to the concept of dumping in international trade, where goods are sold in foreign markets at prices below their cost of production, often with the intent to undermine local competition.[1173] This practice has sparked numerous legal and policy responses at both national and international levels. In terms of regulation, different jurisdictions have developed distinct legal frameworks to address predatory pricing. In India, the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, and its successor, the Competition Act, 2002, have laid down the legal groundwork for identifying and combating predatory pricing. The United Kingdom, through its Competition Act, 1998, also provides a regulatory framework to address this issue. The rise of digital markets and the dominance of platform-based companies have added new dimensions to the challenge of regulating predatory pricing. The unique characteristics of digital markets, such as low marginal costs and significant network effects, require innovative approaches to competition policy. This introduction sets the stage for an in-depth exploration of predatory pricing, covering its various components, types, effects, theoretical foundations, and legal frameworks in different jurisdictions, with a particular focus on its role in the digital economy and its regulation under Indian law.

2. THE CONCEPT OF PREDATORY PRICING:

Predatory pricing is a pricing strategy that involves setting prices for goods or services below their production or delivery cost to eliminate competitors from the market and create insurmountable barriers for new entrants. This leads to the rise of a monopolist who, for a certain period, wields significant control over a substantial part of the market. After displacing other companies, the monopolist raises prices for their products or services. In these conditions, other market players can't remain competitive.

When a business uses predatory pricing, it first loses money because of the temporary price cut. The corporation achieves supernormal profits, surpassing all initial expenses, after eliminating competitors and rapidly boosting

[1173] Areeda, P., & Turner, D. (1975). Predatory Pricing and Related Practices Under Section 2 of the Sherman Act. Harvard Law Review, 88(4), 697-733.

product pricing. It could be extremely difficult for other market participants to resist predatory pricing for a long time if the company using it has significant assets.

The effectiveness of predatory pricing depends on various factors, including:

- The structure of the niche
- Competitors' responses
- The company's ability to recover initial losses after eliminating competition

There are several reasons to use a predatory pricing strategy. In order to overcome sales slumps, increase demand during recessions, launch new goods and services, or pique interest in a sluggish market, brands may temporarily turn to deceptive pricing. In these circumstances, businesses activate the market and draw in price-conscious clients by offering discounts and exclusive deals.

2.1 COMPONENETS OF PREDATORY PRICING:

Predatory pricing thus includes the following:

1. The practice of illegally lowering prices to the point where all competitors are driven out of the relevant market.
2. Predatory pricing violates antitrust laws because it creates an environment that is conducive to monopolies by weakening the market.
3. Customers can only profit from the cheaper prices in the near future.
4. Eventually, the consumer bears the brunt of the corporations' success in driving up prices and driving out competitors from the market.
5. There is less options when prices increase.
6. The Competition Commission of India outlaws predatory pricing and treats it as a violation of the Act that forbids the misuse of a dominant position. [1174]

2.2 TYPES OF PREDATORY PRICING[1175]:

Financial predation:

When an established brand makes sure a rival is unable to pay back or sustain its investors and stockholders, this is known as financial predation. Investors in a rival company, for instance, might provide money while the business takes a chance in a certain market. Investors may set performance criteria during this time. If the business fails to achieve the performance requirements, they have the right to cancel any upcoming funding deals or end the partnership. This tactic doesn't always work because it's not always clear how much money a competition has. Rivals who are new to a market may be pursued by established businesses, as they may have unanticipated beginning costs that could affect their profits. In this case, a well-known brand can use lower prices to affect the rival's ability to honor loan commitments or early performance requirements.

Reputation effect:

The reputation effect falls under the category of signalling strategy, which is a set of moves intended to warn an opponent of potential consequences should they choose a certain course of action but without actually influencing their choice. In the business world, well-known brands use the reputation impact by cutting prices to the point where it appears unprofitable for new businesses to enter the market. For example, when a new company enters a market, it may observe that its competitors are charging cheap prices, which may indicate that their revenue is likewise low. This could have an impact on new businesses, causing them to choose to enter other markets.

Demand signalling:

The process of deceiving other businesses into thinking there is minimal demand in an industry they are entering is known as "demand signalling." This may deter

[1174] Lakshmi Menon, Predatory pricing, Ipleaders (Sep.9, 2024, 5:07 PM), Predatory pricing - iPleaders

[1175] Indeed, (Sep. 9, 2024, 5:23 PM), What Is Predatory Pricing? (Definition, Types And FAQs) | Indeed.com India

them from thinking about entering or growing new markets. It might also drive out the competition as it stands. Demand signalling is generally not likely to occur because the majority of businesses in an industry might not lack thorough information regarding aggregate demand. Price histories and market share data are also publicly accessible to new or less seasoned businesses.

Test market predation:

The practice of covertly lowering prices to affect a new competitor's sales in a test market is known as "test market predation." When a new product is introduced, newly formed companies frequently designate a small market as a test market to gauge consumer reaction before concurrently promoting it in multiple markets. The outcomes of this test could be impacted by test market predation by current rivals in the market. The new business may decide to enter the market on a much lower scale or may decide to withdraw entirely if it is unable to assess the level of demand in a given market.

Signal jamming:

Signal jamming is comparable to test market predation, with the exception that instead of acting covertly when a new rival enters the market, businesses publicly lower their product pricing. The inability of the new company to gather data in typical market conditions has an impact on the test outcomes as well. When a well-known brand employs signal jamming, it frequently upsets the demand for and pricing of other competitors' goods, potentially resulting in ongoing price competition in that market. This typically indicates that the new business is unable to obtain a precise reading of the demand for its product, which prevents it from finishing its examination of the test market[1176].

Cost signalling:

When a well-known brand cuts prices much below the cost rate, it's known as cost signalling, and it might give a rival company the impression that the brand has found a way to cut costs. The rival may leave the market as a result of this. For example, when a brand reduces its rates from ₹2400 to ₹1200, a rival can determine that such pricing is too high for them to compete with and stop advertising that product. Should the rival brand withdraw from the market, the original brand may raise prices once more.

Dumping:

Selling goods for less than they would typically fetch in a home market in order to increase market share abroad is known as "dumping." Some businesses may run into difficulties while implementing this tactic since overseas businesses may buy such goods and resale them to domestic clients at retail prices. This tactic could help certain businesses strengthen their ties with clients in other marketplaces.

2.3 THEORIES FOR CONTROLING PREDATORY PRICING:

Determining the boundary between predatory pricing and anti-competitive normal price competition can be challenging. As a result, a number of guidelines and economic analyses have been developed to detect predatory pricing.[1177]

No rule

Easterbrook asserts that predatory pricing is uncommon and shouldn't be taken seriously. Enacting legislation prohibiting predation—especially if it is uncommon—may result in false positives, which would limit the application of the rule. The argument's central claim is that since predation is ineffective and has a deterrent impact on its own, government action is unnecessary. Selling goods and

[1176] Indeed, (Sep. 9, 2024, 5:23 PM), What Is Predatory Pricing? (Definition, Types And FAQs) | Indeed.com India

[1177] Jones, Alison; Sufrin, Brenda; Dunne, Niamh (2019). *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials*. Oxford University Press. p. 398. ISBN 9780198824657.

services below cost results in losses without gaining market power, and this has a deterring impact. Because the market share holder in this instance has withstood the predatory technique, the market power does not rise. The company punished itself by losing money and failing to increase its market share. Consequently, other businesses are discouraged by this. An additional argument against the implementation of rules is the inability of courts or competition authorities to differentiate predatory from competitive prices.[1178]

Short-term loss rules and the Areeda-Turner test

The short-run cost-based test that Phillip Areeda and Donald Turner created in 1975 is commonly known as the "Areeda-Turner rule." The Long term focus is too speculative and inefficient, hence the regulations are centered on the short term. Prices at or above reasonable expected average variable costs (AVC) are assumed to be permissible, whereas prices below AVC are assumed to be illegal and anti-competitive, according to the Areeda-Turner rule.

A number of significant decisions have clarified how EU law applies to tests for predatory pricing under Article 102 of the Treaty on the Functioning of the European Union (TFEU). The European Commission declined to implement the Areeda-Turner rule in ECS/AKZO.[1179] The Court of Justice maintained this ruling, stating that in addition to a cost-based approach, additional criteria (including evidence of purpose to exclude competition) should be taken into account.[1180] Rather, the Court in AKZO proposed that predatory pricing below AVC, set by a dominating corporation, is considered abusively predatory because it is inferred that the goal is to remove competitors rather than increase profits.[1181] The Court of Justice maintained this ruling, ruling that in addition to a cost-based approach, other elements (including evidence of purpose to exclude competition) should be taken into account.[1182] Rather, the Court in AKZO proposed that predatory pricing below AVC, set by a dominating corporation, is considered abusively predatory because it is inferred that the goal is to remove competitors rather than increase profits.[1183] If a dominating firm were to set prices above AVC but below ATC, it wouldn't be considered a predatory tactic unless there was proof of the dominant firm's intention to crush the competitors.[1184] Furthermore, a dominating corporation may still be judged to be anti-competitive if there is a possibility of significant harm to consumers, even though it is typically not found guilty of predatory pricing if prices are set above ATC. The AKZO test was confirmed in *France Télécom* and *Tetra Pak II*.[1185]

Building on AKZO, the Court of Justice stated in Post Danmark I that if there was no proof the dominant corporation intended to intentionally destroy competition, prices over average incremental costs but below ATC would probably not be declared abusive under Article 102 of the TFEU.[1186]

Long-term cost-based rule

Long-run marginal costs are thought to be a more accurate indicator of predation than short-run costs, according to Posner's long-term cost-based rule. This is because the predator, who sets pricing based on short-term marginal costs, can drive out rivals who cannot bear the same short-term losses. Posner proposed a test to measure predation that establishes a relationship between the whole

[1178] Easterbrook, Predatory Strategies, supra note 1 at 264, 333-37
[1179] *ECS/AKZO* (IV/30.698 Archived 2024-09-09 at the Wayback Machine) Commission decision of 14 December 1985, para 76
[1180] Case 62/86 Archived 2024-09-11 at the Wayback Machine, *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359, para 65
[1181] *ECS/AKZO* (IV/30.698 Archived 2024-09-11 at the Wayback Machine) Commission decision of 14 December 1985, para 76
[1182] Case 62/86 Archived 2024-09-11 at the Wayback Machine, *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359, para 65
[1183] Case 62/86 Archived 2024-09-11 at the Wayback Machine, *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359, para 71
[1184] Case 62/86 Archived 2024-09-11 at the Wayback Machine, *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359, para 72
[1185] Case 202/07 P Archived 2024-09-11 at the Wayback Machine, *France Télécom SA v Commission of the European Communities* [2009] ECR I-2369, para 8
[1186] Case 209/10 Archived 2024-09-11 at the Wayback Machine, *Post Danmark A/S v Konkurrencerådet* [2012] EU:C:2012:172, para 44

average expenses based on the company's books and the average costs from the balance sheet of the business. There would be prerequisites, an intent component, and a defense all part of the test. Posner stipulates that the plaintiff must first show that the market was headed for successful predatory pricing.[1187] Posner provides a list of signs, such as the predator's operation in multiple markets and the Prey's in fewer, concentrated marketplaces, sluggish entry, few peripheral enterprises, homogenous products, and a large number of purchasers. Posner would permit the response company to price its goods at short-run marginal cost by permitting the firm to defend against variations in supply or demand.[1188]

The European Commission's "Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" states that a dominant firm is likely operating at a loss in the short term in order to drive out equally efficient competitors if it fails to cover its average avoidable costs or long-run average incremental costs. Although the Guidance is not legally binding on EU courts, it is a significant document that may have an impact on decisions made in the future.

Rules governing price increases after predation

William Baumol put up a long-term regulation that aims to prevent predatory pricing from being entirely determined by cost-based tests. Baumol's rule stipulates that any price reductions made in reaction to entry must last for five years following the entrant's departure (that is, if an incumbent firm lowers its price to oust an entrant, the incumbent firm is barred from raising prices for five years). This law severely reduces a corporation's motivation to engage in predatory pricing because, for the five years, the predatory firm cannot profit from its anti-competitive behaviour (monopoly profits). Although Baumol's proposed criterion is not infallible, it does provide the predator some leeway to boost its post-exit pricing if it can show that the firm's expenses have changed or that there has been a significant increase in market demand.

FURTHER STRATEGIES

Industry-specific rules

According to Craswell and Fratrik, there is no need for a Legal criteria to identify predatory pricing in the retail sector, and doing so shouldn't be considered an antitrust violation. The main argument was that predatory pricing usually needs high obstacles to entry in order to produce long-term profits, which the retail grocery business does not have. Supermarkets frequently lower their prices in response to the entry of low-cost warehouse shops in order to drive them out of the market or deter them from growing. But according to Craswell and Fratrik, incumbent businesses may be participating in non-predatory price reductions necessary for regular competition rather than predatory pricing.[1189]

Rule of reason test

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" is forbidden by Section 1 of the Sherman Act Antitrust Act of 1890. Nonetheless, courts now use the cause test to examine how a trade restriction affects competition. There may be a four-step rule of reason test, according to recent case law4333.[1190] First, a "anti-competitive effect" must be proven by the plaintiff. The defendant is also required to present a "legitimate procompetitive justification". Third, the plaintiff needs to emphasize that there are "less

[1187] Richard A. Posner, Antitrust Law. An economic Perspective (University of Chicago Press, 1976), 189
[1188] Richard Posner, Antitrust Law: An Economic Perspective 189-190 (1976)

[1189] Craswell, R & Fratrik, M R 1986, 'Predatory Pricing Theory Applied: The Case of Supermarkets vs. Warehouse Stores,' *Case Western Reserve Law Review*, vol. 36, no. 1, pp. 1-49, viewed 11 Sep 2024, <https://scholarlycommons.law.case.edu/caselrev/vol36/iss1/3 Archived 2024-09-11 at the Wayback Machine>
[1190] Carrier, MA 2019, 'The Four-Step Rule of Reason,' *Antitrust*, vol. 33, no. 3, pp. 50-51, viewed 13 Sep 2024, < https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf Archived 2024-09-13 at the Wayback Machine>

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restrictive alternatives" or that the limitation is not "reasonably necessary" to accomplish the defendant's goals. Fourth, the Court will weigh the "pro-competitive justifications with its anti-competitive effects" of trade constraint. The allegation of an antitrust violation will be dismissed if any one of these requirements is not met.

Output restriction rule

Williamson suggests using the production restriction rule as a means of preventing dominant companies from using predatory pricing. According to the rule, a dominant firm cannot misuse its position by raising its output above the pre-entry level when a new firm enters the market. It should be sufficient for new entrants to develop a market identity and comprehend economies of scale during a 12- to 18-month preventive period, which will also deter incumbent enterprises from hoarding surplus capacity. According to Williamson, the short-run average cost rule or the short-run marginal cost rule are inferior than the output restriction rule in terms of welfare features.[1191]

Two tier approach

The two-tier method offered by Joskow and Klevorick can be used to recognize exploitative pricing. The first step entails analysing the market power of the company that is allegedly participating in anti-competitive behaviour as well as the structural features of the relevant market. The plaintiff must show that predatory pricing and losses in economic efficiency would be common in the market where the behaviour took place. In the second phase, there are behavioural factors that could indicate predation, like the dominating firm charging less than average for variable costs.[1192]

The Brooke Group rule

The US Supreme Court created the Brooke Group rule in 1993 in relation to the specific case of Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation. According to this regulation, the plaintiff had to demonstrate the following in order to be held guilty of predatory pricing:

1. The defendant lowered prices to their own manufacturing costs.
2. Should the defendant be successful in driving rivals out of the market, there was a good chance that they would eventually raise prices to make up for their losses.
3. It was evident that the defendant intended to use predatory pricing.

If the defendant provides adequate proof of the expenditures incurred in producing their goods and services, the first element can be established. Evidence demonstrating the defendant's market dominance, entry hurdles, and other factors that are likely to cause future price increases can be used to prove the second element. To prove the defendant's intention to employ predatory pricing to manipulate the market, direct proof would be needed for the third element. This could be discovered by obtaining internal company plans or records.[1193]

Under US antitrust law, the plaintiff may assert predatory pricing if all elements are demonstrated with adequate proof for each, as per the Brooke Group rule.[1194]

3. EFFECTS OF PREDATORY PRICING:

When a business sets its prices much lower than its rivals—often even less than its own manufacturing costs—it is engaging in predatory pricing, which aims to force rivals out of the market. Due to lower pricing, this technique could appear advantageous to

[1191] Lefever, JT 1981, 'Predatory Pricing Rules: A Comment on Williamson's Output Restriction Rule,' *The Yale Law Journal*, vol. 90, no. 7, pp. 1639, viewed 13 Sep 2024, < https://www.jstor.org/stable/796084 Archived 2024-09-13at the Wayback Machine>

[1192] Joskow, PL & Klevorick, AK 1979, 'A Framework for Analysing Predatory Pricing Policy,' *The Yale Law Journal*, vol. 89, no. 2, pp. 213-270, viewed13 Sep 2024, < https://www.jstor.org/stable/795837 Archived 2024-09-13at the Wayback Machine>

[1193] "Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)". *Justia Law*. Retrieved 2024-09-13.

[1194] *Areeda, Hovenkamp, P., H. (2013). "Antitrust Law: An Analysis of Antitrust Principles and Their Application". New York: Wolters Kluwer (4).*

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customers in the short run, but it might have a negative long-term impact on market competition and overall consumer welfare.

Short-Term Effects

Predatory pricing affects the business in the short run, but it helps customers in the long run since it allows them to shop around and purchase goods at reduced prices. With time, rival brands can start to cut their own prices in response to a particular brand's cheap prices. Consequently, several brands cut their costs in an effort to attract customers. The business that makes it through this competition will be able to make money from controlling the market and make up for its losses.

Long-Term Effects

In the short term, predatory pricing hurts the business, but in the long run, it benefits customers by enabling them to shop about and get items at lower costs. Competing brands may eventually begin to lower their own prices in reaction to a particular brand's low prices. As a result, some brands made cost reductions to try and draw in customers. The company that survives this rivalry will be able to recover its losses by controlling the market and earning money.[1195]

Effects of Predatory Pricing:

1. **Elimination of Competition:**

Predatory pricing is designed to undercut competitors who may not have the financial strength to sustain prolonged losses. Smaller firms, in particular, are often forced out of the market, reducing competition.

2. **Creation of a Monopoly or Market Dominance:**

Once competitors are eliminated, the predatory firm can dominate the market. Without competition, the firm can set higher prices and exploit its monopoly power, offsetting the losses incurred during the predatory phase.

3. **Harm to Consumers:**

In the short term, consumers benefit from low prices, but once competitors are driven out and the firm establishes dominance, prices are likely to rise. The lack of competition can lead to fewer choices, higher prices, and lower product quality or innovation.

4. **Barriers to Market Entry:**

Predatory pricing deters new companies from entering the market. Potential competitors may perceive the market as too risky if they believe that the dominant firm will engage in similar pricing tactics against them. This entrenches the power of the incumbent firm.[1196]

5. **Market Distortions:**

By selling at a loss, predatory firms distort the natural market balance of supply and demand. They also undermine the normal competitive process that drives firms to innovate and improve efficiency.

6. **Legal and Regulatory Implications:**

Predatory pricing is considered anti-competitive and illegal in many jurisdictions under competition laws (such as the Sherman Act in the U.S. and the Competition Act in India). Regulatory authorities often investigate firms suspected of engaging in such behaviour, leading to potential penalties and damages.

7. **Impact on Industry Structure:**

The practice can alter the overall structure of an industry, consolidating power into fewer hands. This concentration can reduce the dynamism of the market, inhibit innovation, and limit the ability of smaller players to survive.[1197]

4. DUMPING AS PREDATORY PRICING:

A corporation or nation that exports a good at a price below its usual value—typically below the cost of production or the price it commands on the home market—is engaging in dumping, a type of predatory pricing used in international

[1195] Thomas Bennett, What is Predatory Pricing? (Sep. 11, 2024, 6:32 pm), Predatory Pricing: Definition, Examples & Effects | Priceva

[1196] Easterbrook, Predatory Strategies, supra note 1 at 264, 333-37

[1197] "Predatory Pricing" (PDF). OECD. 1989. Archived (PDF) from the original on September 3, 2020. Retrieved 2024-09-13.

trade.[1198] Similar to domestic predatory pricing, the main objective of dumping is to undercut foreign competitors, increase market share, and maybe create a monopoly in the target market. International predatory pricing, or "dumping," has negative effects on both home businesses and international trade relations. Lower pricing may benefit consumers at first, but market monopolization, increased prices, and weakened sectors in the target country are frequently the long-term effects. Governments usually use anti-dumping laws and trade restrictions to stop these results.

Dumping as Predatory Pricing:

1. **Goal of Dumping:**

Similar to domestic predatory pricing, dumping is used to eliminate competition in a foreign market. By exporting goods at an artificially low price, the exporting company seeks to weaken or eliminate local competitors who cannot sustain such low pricing.

2. **Short-Term Benefits for the Target Market:**

Initially, consumers in the importing country benefit from cheaper goods. This can lead to increased demand for the dumped products, putting significant pressure on domestic industries that produce the same or similar products.

3. **Long-Term Consequences:**

Once local competitors are driven out of the market, the exporting firm can raise prices, often to monopolistic or oligopolistic levels. At this stage, the negative impacts of dumping become evident, including higher prices, reduced product choice, and stunted innovation in the affected industry.

4. **Global Trade Distortion:**

Dumping distorts fair competition on a global scale. It undermines free trade principles and disrupts the economic stability of industries in the importing country. This can lead to trade imbalances and tensions between countries.

5. **Impact on Domestic Industry:**

Domestic companies in the importing country may suffer severe financial losses, often leading to layoffs, plant closures, or bankruptcy. This can have a cascading effect on the economy, particularly in industries critical to national interests, like steel or agriculture.

6. **Anti-Dumping Measures:**

To counteract dumping, many countries have implemented anti-dumping laws and measures. Under the World Trade Organization (WTO) agreements, a country can impose tariffs or duties on dumped products if it can prove that:

- Dumping is occurring.
- Domestic industries are suffering due to the dumped imports.
- There is a clear causal link between the dumping and the harm to domestic industry.

7. **Difference from Traditional Predatory Pricing:**

While both dumping and predatory pricing share the same basic objective—driving competitors out of business-dumping involves cross-border trade, making it a more complex issue. Dumping often leads to international disputes, with affected countries seeking redress through trade sanctions, tariffs, or appeals to the WTO.

8. **Legal Challenges:**

Identifying and proving dumping can be challenging. The affected country must demonstrate that the export prices are lower than the normal value or cost of production in the exporting country, and show the resulting harm to its domestic industries.

5. **PREDATORY PRICING IN DIGITAL MARKET:**

Predatory pricing in the digital market presents unique challenges and considerations

[1198] Funk, Michael (25 July 2018). "The More Economic Approach To Predatory Pricing" (PDF). *Journal of Competition Law & Economics*. **14** (2): 292–310. doi:10.1093/joclec/nhy008 – via Advanced Access publication.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 4 AND ISSUE 4 OF 2024

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

https://iledu.in

compared to traditional markets. The rapid growth of digital platforms, online marketplaces, and tech companies has led to new forms of competitive behaviour, including predatory pricing, that regulators must address within the framework of existing competition laws.[1199]

1.Characteristics of Predatory Pricing in the Digital Market

Network Effects: Digital markets often exhibit strong network effects, where the value of a product or service increases as more people use it. Companies may engage in predatory pricing to quickly grow their user base and become the dominant platform.

Economies of Scale: Digital businesses often benefit from significant economies of scale, where the marginal cost of adding an additional user is very low. This can enable companies to sustain low prices for extended periods, making it harder to distinguish between competitive pricing and predatory pricing.

Data as a Competitive Tool: In the digital economy, data is a crucial asset[1200]. Companies might engage in predatory pricing not just to eliminate competition but also to collect more data, which can be used to further entrench their market position.

Freemium Models: Many digital platforms use freemium models, offering basic services for free while charging for premium features. This complicates the identification of predatory pricing, as the free service could be seen as undercutting competitors.

2.Legal Framework and Challenges

Traditional Competition Laws: Existing competition laws, like the Competition Act 1998 in the UK or the Competition Act 2002 in India, apply to digital markets, but enforcement can be challenging. These laws were designed for traditional markets and may not fully capture the complexities of digital markets.

Market Definition: Defining the relevant market is crucial in any predatory pricing case, but it can be particularly difficult in digital markets due to their global nature, rapid innovation, and multi-sided platforms (e.g., platforms serving both users and advertisers).

Dominance Assessment: Assessing dominance in digital markets requires a nuanced approach, considering factors like market share, control over data, and the ability to exclude competitors. Companies may have a significant presence in one aspect of the market but face competition from other angles.

3.Regulatory Responses

Strengthening Competition Law: Some jurisdictions are considering updates to competition laws to better address the unique challenges of digital markets. For example, the UK has proposed a new pro-competition regime for digital markets that would impose stricter rules on companies with "strategic market status."

Ex-ante Regulation: There is a growing trend towards ex-ante regulation, where rules are put in place to prevent anti-competitive behaviour before it occurs, rather than relying solely on ex-post enforcement. The EU's Digital Markets Act (DMA) is an example, aiming to regulate "gatekeeper" platforms to prevent abuse of dominance.

Increased Scrutiny of Mergers and Acquisitions: Regulators are paying closer attention to mergers and acquisitions in the digital space, particularly those that might eliminate nascent competition. This is partly in response to concerns that large tech companies might acquire startups to prevent future competition.[1201]

[1199] Carrier, MA 2019, 'The Four-Step Rule of Reason,' *Antitrust*, vol. 33, no. 3, pp. 50-51, viewed 11 Sep 2024, < https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf Archived >

[1200] Williamson, OE 1977, 'Predatory Pricing: A Strategic and Welfare Analysis,' *The Yale Law Journal*, vol. 87, no. 2, pp. 284-340, viewed 11 Sep 2024, < https://www.jstor.org/stable/795652 Archived

[1201] Predatory pricing - iPleaders

4.Future Considerations

Dynamic Markets: Digital markets are highly dynamic, with new competitors and business models emerging rapidly. Regulators must be agile and forward-looking to address potential predatory pricing concerns.

Global Coordination: Digital markets are inherently global, making international cooperation among competition authorities crucial. Divergent approaches to predatory pricing across jurisdictions can lead to regulatory arbitrage, where companies exploit differences in enforcement.

Artificial Intelligence and Algorithms: The use of AI and algorithms in pricing strategies adds another layer of complexity. These tools can optimize pricing in real-time, potentially leading to predatory pricing behaviours that are difficult to detect and regulate.

Predatory pricing in the digital market poses significant challenges for regulators. While traditional competition laws provide a foundation, the unique characteristics of digital markets—such as network effects, data control, and global reach—require tailored approaches. As digital markets continue to evolve, regulators will need to adapt and innovate to ensure that competition remains fair and that consumers are protected from anti-competitive practices.

6. LEGAL FRAMEWORK OF PREDATORY PRICING IN INDIA AND UNITED KINGDOM:

LEGAL FRAMEWORK IN INDIA:

The Indian government created regulations that were later altered in an effort to stop the practice of unhealthy rivalry between different businesses. To have robust competition within the new legal framework was the goal. The MRTP Act of 1969 was the first law ever passed by the government. Because it was intended to prohibit the monopoly that particular segments of the market had developed, it was the first kind of completeness law.

The Directive Principles formed the foundation of the MRTP Act. There was a sense that the Act needed to be modified as globalization and liberalization took hold. But since it didn't work, the framers made the decision to create a law that reflected the nation's changing needs. There was a need to switch to encouraging competition since the MRTP Act grew outdated in some regions.
The Central Government established a high-level committee, whose goal was to draft legislation that would stop competitors from using illegal tactics to gain a monopoly in the relevant market and regulate them if they are in the wrong by enforcing penalties and punishments that would discourage others from following in their footsteps.

To ensure a healthy competition in the market amongst the players the Competition Act, 2002, has been introduced in replacement of the Monopolies and Restrictive Trade Practices Act, 1969, seeks to ensure the welfare of the consumers. Upon realizing the risk and challenges posed by predatory pricing, which mostly a clear abuse of the 'dominant position' in the market, which per-se is illegal; the dealings of predatory pricing in India, as expressed under the Competition Act, 2002, have been borrowed from the English Competition Act, 1998 and the Clayton Anti-Trust Act, 1914.[1202]

Section 4(2) (a) of the Competition Act, 2002 states that:
There shall be an abuse of dominant position under Sub-section (1), if an enterprise,
(a) directly or indirectly, imposes unfair or discriminatory-
(i) condition in the purchase or sale of goods or service; or
(ii) price in purchase or sale (including predatory price) of goods or services.
Explanation For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in Sub-

[1202] *Salop, S.C (1986). "Predatory pricing: Strategic Theory and Legal Policy". Antitrust Law Journal.* ***56*** *(2): 253–293.*

clause
and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause
shall not include such discriminatory condition or price which may be adapted to meet the competition;
As per explanation (b) at the end of Section 4 predatory pricing refers to a practice of driving rivals out of business by selling at a price below the cost of production.16 Denial of market access briefly referred to in this section, if read conjunctively, is expressly prohibited under Section 4 (2) (c) of the Competition Act, 2002.

Section 4 of the Competition Act, 2002 corresponds to Clause 4 of the Notes in clauses of the Competition Bill, 2001 which reads as follows:

This clause prohibits the abuse of a dominant position by any enterprise. Such abuse of dominant position, inter alia, includes imposition, either directly or indirectly, or unfair or discriminatory purchase or selling prices or conditions, including predatory prices of goods or services, indulging in practices resulting in a denial of market access, making the conclusion of contracts subject to acceptance by other parties of supplementary obligations and using a dominant position in one market to enter into or protect another market.[1203]

However, in 2007, Section 4 of the Competition Act, 2002 was amended by the Competition (Amendment) Act, 2007. The objects and reasons for such amendments were given in the Notes on clauses of the Competition (Amendment) Bill, 2007 which says that:[5] This clause seeks to amend Section 4 of the Competition Act, 2002 relating to abuse of dominant position. The existing provisions of Section 4 apply only to an enterprise and not to the group of enterprises. Clause (c) Sub-section (2) of Section 4 states that there shall be an abuse of dominant position if an enterprise indulges in practice or practices resulting in a denial of market access.

Role of the Competition Commission of India (CCI)

The Competition Commission of India (CCI) is the authority responsible for enforcing the Competition Act. It investigates cases of predatory pricing, either on its own or based on complaints filed by affected parties. The CCI assesses whether the price is below the "cost," typically using the Average Variable Cost (AVC) or Marginal Cost (MC) as benchmarks. If the CCI finds that an enterprise has engaged in predatory pricing, it can impose significant penalties, which may include a fine of up to 10% of the enterprise's turnover and orders to cease such practices.

Exemptions and Defenses

Promotional Pricing: Not all low pricing strategies are considered predatory. Temporary promotional pricing, intended to attract customers, may be allowed if it does not intend to eliminate competition.

Objective Justifications: An enterprise may defend itself by proving that the low pricing was due to legitimate business strategies, such as efficiency gains or economies of scale, rather than an intent to eliminate competition.

In the case of ***MCX Stock Exchange & Others vs. National Stock Exchange, 2011,*** a complaint was filed by MCX against NSE under Section 19(1)(a) of the Competition Act for violating Section 4 of the Act.

The issues were:

1.Whether zero pricing including waiver of data fee, transaction fee, and admission charges by NSE in their currency derivative segment (CD) amounted to an abuse of dominant position in the relevant market.
2.Whether NSE has directly or indirectly imposed unfair predatory pricing in the sale of services.
In its finding, CCI stated that the zero-pricing set by the National Stock Exchange in its currency derivate segment was a part of its sound business strategy and not for eliminating competition and it cannot be said that the

[1203] The Competition Act, 2002. S.4

INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]
VOLUME 4 AND ISSUE 4 OF 2024
APIS – 3920 - 0001 *(and)* ISSN - 2583-2344
Published by
Institute of Legal Education
https://iledu.in

pricing was unfair or predatory. CCI, therefore opined that there was no violation of Section 4 of the Competition Act, 2002.

In this case ***Vaibhav Mishra vs. Sppin India Private Ltd. (known as 'Shopee Case'), 2022***

Sppin India Pvt Ltd is an online marketplace. In this case, Vaibhav Mishra had filed a complaint with CCI alleging contravention of Sections 3 and 4 of the Competition Act.

The issue was Spinn India was selling products below the cost price and was offering huge discounts which were nothing but predatory pricing as they intended to eliminate competition from small players and this resulted in unfair trade practices.

CCI in its decision stated that though Shopee was involved in predatory pricing, it was not holding any dominant position in the online platform market, So it cannot be fined under Section 4(2)(a)(ii) of the Competition Act.

In the case, ***Fast Track Call Cab Pvt. Ltd. vs. Ani Technologies Pvt. Ltd., 2015***, the informant i.e., Fast Track, a radio taxi service company had filed a complaint before CCI against the opposite party Ani Technologies, a radio taxi service company that ran their taxi under the brand name OLA.

The issue was that OLA was offering heavy discounts to its customers and its cab drivers were also given good incentives. Because of this, the competitors were finding it very difficult to match OLA and it affected their business and that this amounted to predatory pricing under Section 4(2)(a)(ii) of the Competition Act.

The Commission, prima facie found that OLA held a dominant position in the market and therefore the DG was directed to investigate the matter. On the basis of analysis, DG concluded that OLA was not dominant in the relevant market as its share in the market had declined due to the entry of Uber and therefore the question of abuse does not arise. CCI considered the size and resources of the competitors rather than the market share of OLA and opined there was no abuse of Section 4 of the Competition Act.

In the case of ***C. Shanmugham and Manish Gandhi vs. Reliance Jio Infocomm Ltd., 2017*** the informers (Mr. Shanmugham and Mr. Gandhi) had alleged that Reliance Jio was indulging in predatory pricing as they were abusing their dominant position and this was a violation under Section 4 of the Competition Act. The informers further said Reliance Jio had infused huge investments and used free voice services, roaming services, data services and heavy discounts to its customers as a tool to penetrate into the market. This was causing losses to other telecom operators.

The issue was whether Reliance Jio had violated Section 4 of the Competition Act by indulging in anti-competitive practices through predatory pricing. CCI observed there are many players in the relevant market. Some are domestic and some are foreign. In this case, the competitors are not excluded. These players have capabilities, capital and economic resources. So customers have wide options to choose from. CCI concluded that Reliance Jio has not abused its dominant position so prima facie there is no case against Reliance Jio.

In the case, ***Transparent Energy Systems (P) Ltd. vs. TECPRO Systems Ltd., 2013*** CCI has laid down the four important factors which determine the predatory pricing policy. They are as follows:

i. Whether the price which is set by enterprises is below the cost price;

ii. Whether the purpose of any enterprise is to eliminate competition from the market;

iii. Whether there is any plan to recover the losses once the market rises;

iv. Whether the existing competition is eliminated.

LEGAL FAMEWORK IN UNITED KINGDOM:[1204]

In the United Kingdom, predatory pricing is addressed under the competition law framework, primarily governed by the

[1204] Jones, Alison; Sufrin, Brenda; Dunne, Niamh (2019). *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials*. Oxford University Press. p. 398. ISBN 9780198824657.

Competition Act 1998 and relevant provisions of the Enterprise Act 2002. The legal framework is aligned with European Union competition law, as the UK was a member of the EU when these laws were enacted. Below is an overview of the legal framework surrounding predatory pricing in the UK:

1. Competition Act 1998

The Competition Act 1998 is the primary legislation that deals with anti-competitive practices in the UK. It mirrors the principles of European competition law, particularly those found in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Chapter II Prohibition - Abuse of Dominant Position

- Predatory Pricing Definition: Under Chapter II of the Competition Act 1998, predatory pricing is considered an abuse of a dominant position. It involves setting prices so low that it drives competitors out of the market or deters entry by new competitors.
- Dominance: Similar to the approach in EU law, dominance is assessed by considering market share, market power, and the ability of the enterprise to act independently of competitive pressures.
- Abuse: Engaging in predatory pricing is viewed as an abuse of dominance. The intention behind such pricing is critical—specifically, whether the pricing is intended to eliminate competition and establish or maintain a dominant position.[1205]

Cost Benchmarks

- Average Variable Cost (AVC): Prices below AVC are typically seen as predatory because they do not cover the cost of producing an additional unit of the product.
- Average Total Cost (ATC): Prices between AVC and ATC may also be considered predatory if there is evidence of an intent to eliminate competition.

2. Role of the Competition and Markets Authority (CMA)

- Enforcement: The Competition and Markets Authority (CMA) is the primary body responsible for enforcing competition law in the UK. It has the authority to investigate and penalize enterprises that engage in predatory pricing.
- Investigations: The CMA can initiate investigations on its own or based on complaints. During investigations, the CMA will examine market conditions, the cost structures of the firm, and any evidence of intent to drive competitors out of the market.
- Penalties: If a company is found guilty of predatory pricing, the CMA can impose significant fines, which can be up to 10% of the company's global turnover. The CMA can also issue orders to stop the abusive practice and take corrective measures.

3. Interaction with European Union Law (Pre-Brexit)

- Before Brexit, the UK's approach to predatory pricing was closely aligned with EU competition law. The UK courts and the CMA often referred to EU case law and principles when interpreting the Competition Act 1998.

4. Post-Brexit Adjustments

- Post-Brexit, the UK has retained the core principles of competition law but has the flexibility to diverge from EU law. The principles governing predatory pricing are expected to remain largely consistent, but the UK has the authority to adapt its approach as needed.

5. Defenses and Justifications

- Objective Justifications: A company may defend itself against allegations of predatory pricing by demonstrating that its pricing strategy was based on legitimate business reasons, such as achieving efficiencies, meeting competition, or passing on cost savings to consumers.

[1205] Ekaterina, Rousseva (2010). *Rethinking Exclusionary Abuses in EU Competition Law*. Hart Publishing. p. 408. ISBN 9781841139265.

- No Dominance: If a firm can show that it does not hold a dominant position in the relevant market, then predatory pricing allegations would not stand under the Competition Act 1998.

7. **PREDATORY PRICING: MRTP ACT V. COMPETITION ACT:**

The shift from the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) to the Competition Act, 2002 in India marked a significant change in the approach to regulating competition and anti-competitive practices, including predatory pricing. Here's a comparison of how predatory pricing is addressed under the two regimes:

1. **MRTP Act, 1969**[1206]

The MRTP Act was the primary legislation governing monopolistic, restrictive, and unfair trade practices in India before the enactment of the Competition Act. However, the MRTP Act had several limitations in dealing with modern competition issues, including predatory pricing.

Approach to Predatory Pricing

- Monopolistic Trade Practices: The MRTP Act focused on preventing monopolistic trade practices, which included practices that limited competition. However, the Act did not explicitly define or address predatory pricing as a distinct anti-competitive practice.

- Focus on Dominance: The MRTP Act was more concerned with the prevention of concentration of economic power and controlling monopolies. The concept of "abuse of dominance," which is critical to understanding predatory pricing, was not well-developed under the MRTP regime.

- Ineffective Enforcement: The enforcement mechanisms under the MRTP Act were considered weak, and the MRTP Commission lacked the necessary powers and tools to effectively tackle complex anti-competitive practices like predatory pricing.

Limitations

- Lack of Clarity: The MRTP Act did not provide a clear definition or framework for identifying and prosecuting predatory pricing.

- Outdated Framework: The Act was seen as outdated, with its focus on controlling monopolies rather than fostering competition. It was ill-equipped to handle the challenges of a liberalized economy where predatory pricing by large players could stifle competition.

2. **Competition Act, 2002**[1207]

The Competition Act, 2002 was introduced to replace the MRTP Act, with the aim of promoting competition, preventing anti-competitive practices, and protecting consumer interests in a liberalized economy.

Approach to Predatory Pricing

-Explicit Definition: The Competition Act explicitly defines predatory pricing under Section 4(2)(a)(ii) as "the sale of goods or provision of services, at a price which is below the cost, with a view to reducing competition or eliminating competitors." This provides a clear legal basis for identifying and addressing predatory pricing.

- Abuse of Dominance: Predatory pricing is considered an abuse of dominance under the Competition Act. The Act provides a detailed framework for determining dominance and assessing whether a firm has abused its dominant position by engaging in predatory pricing.

- Role of the Competition Commission of India (CCI): The CCI is empowered to investigate and penalize firms engaged in predatory pricing. The CCI has the authority to impose significant fines and issue orders to prevent further anti-competitive practices.

-Modern Economic Approach: The Competition Act adopts a modern economic approach to competition law, focusing on market efficiency, consumer welfare, and the promotion of healthy

[1206] MRTP Act, 1969

[1207] Competition Act, 2002.

competition. This approach is better suited to addressing complex issues like predatory pricing in a rapidly changing market environment.

Strengths

- Clear Legal Framework: The Competition Act provides a clear and robust legal framework for dealing with predatory pricing, with well-defined criteria for assessing dominance and abuse.

- Effective Enforcement: The CCI has been given significant powers to investigate, penalize, and enforce competition law, making it a more effective tool for combating predatory pricing.

- Focus on Consumer Welfare: The Act shifts the focus from merely preventing monopolies to promoting competition and protecting consumer interests, aligning with global best practices in competition law.[1208]

8. CONCLUSION & SUGGESTION:

Predatory pricing is potentially beneficial to consumers in the short term, poses significant long-term risks to competitive market structures. Predatory pricing disrupts market dynamics by artificially lowering prices, driving out competitors, and allowing dominant firms to consolidate their power. This strategy leads to a reduction in consumer welfare, innovation, and choice once a monopoly or oligopoly is established, as the predatory firm is likely to raise prices and limit competition once rivals are eliminated.

From a strategic theory, predatory pricing may seem like a viable tactic for gaining market dominance; however, its long-term sustainability is questionable. Firms engaging in this practice may face significant financial losses during the predatory phase and run the risk of legal sanctions. Additionally, market entry barriers created by predatory pricing distort the natural competitive process, hindering the emergence of new entrants and innovation. In terms of legal policies, while many countries have implemented frameworks to combat predatory pricing, enforcement remains complex. Laws such as the Sherman Act in the United States and the Competition Act in India, while effective to an extent, face challenges in proving intent and harm. International predatory pricing, or dumping, further complicates enforcement, as it requires global cooperation and compliance with World Trade Organization (WTO) regulations. The ambiguity surrounding the definition of predatory pricing, along with the difficulty in proving anti-competitive intent, makes it challenging for regulators to impose effective deterrents. Overall, while legal mechanisms are in place to prevent and mitigate the negative effects of predatory pricing, these frameworks need constant refinement to keep pace with evolving market strategies and global trade complexities.

SUGGESTIONS:

Strengthening Legal Frameworks:

Regulatory bodies should continuously update and strengthen existing anti-competitive laws to ensure that they can effectively address new forms of predatory pricing, including those that arise in the digital economy. Clearer definitions and guidelines on what constitutes predatory pricing should be provided to ensure that enforcement is more straightforward and less reliant on proving intent.

Enhanced Monitoring and Enforcement:

Governments should allocate more resources toward monitoring pricing strategies in key industries to detect predatory practices early. Increased collaboration between competition authorities across borders is essential to combat predatory pricing in international markets, especially in cases involving dumping.

Encouraging Market Competition:

Rather than focusing solely on penalizing predatory firms, policies should also foster innovation and competition by encouraging the

[1208] Ordover, J.A. (2008). Predatory Pricing. In: The New Palgrave Dictionary of Economics. Palgrave Macmillan, London. https://doi.org/10.1057/978-1-349-95121-5_1778-2

entry of new players into the market. This can be achieved by reducing regulatory barriers for startups and SMEs, providing subsidies or support for struggling competitors, and ensuring that markets remain open and contestable.

Promoting Consumer Awareness:

Educating consumers about the long-term risks of predatory pricing can help create public pressure against firms engaging in such practices. Governments and consumer protection agencies can run awareness campaigns, highlighting the eventual negative consequences of short-term price reductions.

Global Cooperation:

To address the challenges posed by international predatory pricing and dumping, greater cooperation between countries is required. Strengthening global trade agreements and ensuring adherence to anti-dumping regulations set by the WTO can create a more level playing field in international trade.

Periodic Review of Market Practices:

Competition authorities should conduct periodic reviews of industries prone to predatory pricing, particularly those with high barriers to entry or characterized by large incumbents. This proactive approach can help in detecting patterns of anti-competitive behavior before they cause irreparable harm to the market.

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INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 4 AND ISSUE 4 OF 2024

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

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